IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.614 OF 2003

Shri P.R. Nair & Ors. ...Petitioners
Vs.
Union of India & Anr. ...Respondents

Mr.A.S.Rao, Advocate for Petitioners
Mrs. S.V.Bharucha , Advocate for Respondents 1 & 2

CORAM: SMT.RANJANA DESAI &
SMT.ROSHAN DALVI, JJ.
Date of Reserving the Judgment: 20TH NOVEMBER, 2007
Date of Pronouncing the Judgment:7TH DECEMBER, 2007

JUDGMENT (Per Smt. Roshan Dalvi, J.)

1. A short point of law covered by the judgment of the Apex Court is required to be considered in this Writ Petition.

2. The petitioners work in the Cadets Mess of the Armed Forces Medical College (AFMC). The college is run by the Central Government. It is fully funded by the Central Government. It has a residence hostel. The Mess is administered by a Mess Committee comprising the students of the College. The mess is one of the facilities provided to the students in the College Campus. The Mess Committee is

the students body comprising the Mess Secretary, Assistant Mess Secretary, Food Member and Property Member etc. who are nominated/elected by the students.

3. There are no sanctioned posts for the students mess. Hence, the students themselves employ persons for the activities of the mess.

4. As per the list, Exhibit-A to the Petition, the petitioners work in capacity of Cashier, Billing Clerks, Clerks, Plate washers, Messengers, Waiters, Masalchi, Barbar and Office boy of the Mess.

5. The petitioners are not employed by the Government. There is no prescribed procedure for their appointment as Government Servants. They cannot be classified as Class-IV employees.

6. It is contended by the petitioners that since the Medical College is run and funded by the Central Government and is the permanent establishment of the Central Government and the Mess is an integral part of the College, the petitioners must be confirmed in service. The petitioners claim to have put in long tenures of service in the Mess as shown in the list Exhibit-A. The petitioners claim that, since the mess

committee is funded by the Armed Forces. Medical College and substantial payments are received by the College and the College has infrastructure like land and buildings, the petitioners must derive the benefits of permanency in service.

7. They claim that even employees such as watchmen and gardeners who are employed by the Government themselves in service are given full benefits, which have been denied to the petitioners, resulting in gross discrimination.

8. It is contended by the respondents that the petitioners' nature of service is like that of the domestic servants for the students of the College, though the College is fully funded by the Central Government. The College is fully funded, but mess is not. The mess is therefore, delinked from the Government and the employees for the students cannot be classified as Class IV (Group D) Government employees but are employees of the Students' Body.

9. The petitioners have not shown that they have been employed by the Central Government. The petitioners have not produced any appointment letters. They have not shown any contract of service. They have not shown that the posts which they claim are sanctioned posts. Their permanency is

only recommended by the Officers of the College.

10. The petitioners are, therefore, not Government employees. In fact they are not even temporary Government employees. Their original appointment was not made by following the due process of law envisaged by the rules applicable to the College run by the Central Government. Granting them regularisation, absorption, permanency or re-engagement would, therefore, be by a procedure not established by law. It would create another mode of public appointment viz: appointment by granting permanency of Government service to persons individually appointed. That would be back-door entry as against the settled procedure of appointment established by law.

11. The case of the petitioners is, therefore, fully covered by the judgment of the Apex Court in the case of Secretary, State of Karnataka Vs. Umadevi , (2006)4 SCC, 44.

12. The jurisprudence with regard to public employment in terms of the constitution scheme and considering the economic situation in the country after considering various judgments has been enunciated in the case of Umadevi (supra). The judgment laid down the following distinct aspects of law relating to public employment.

- Equality of the opportunity is the hallmark of the constitution.
- Affirmative action is to ensure that unequals are not treated equally.
- Government can make temporary appointments or engage workers on daily wages when needed. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts to be filled.
- Proper appointment procedure through public service commissions or otherwise as per rules must be adopted.
- Irregular appointees or those appointed on contract or daily wages or through a back-door cannot prevent regular recruitment in permanent posts. "Litigious employment" is to be curbed as it defeats social justice and equal opportunity for all under the constitutional scheme.
- The mandate on the High Courts is to desist from issuing orders preventing regular selection or regular recruitment or continuence of irregular appointments.
- Individualisation of justice is to be avoided.
- Equity is not for a handful of people who have

approached the Courts as against the millions who seek employment under a fair opportunity.

- The Courts must adhere to the law as laid down by the Constitution and not pass orders which run counter to the constitutional scheme or which would water-down the constitutional requirements.
- A State should be a model employer. The power of the State as an employer is more limited than that of a private employer. It is subject to the constitutional limitations. It cannot be exercised arbitrarily.
- The power of appointment must be in consonance with Article 309 of the Constitution which gives power to frame rules with regard to appointments in public service. The procedure established under Article 309 and the rules must regulate recruitment and service conditions.
- The appointment can be made only in accordance with the rules.
- Vacancies must be notified. Filling up those vacancies must be based on established procedure and the rules framed.
- Following any other course would deprive security of tenure and the right of equality of civil services under constitutional scheme.

- Employees appointed on temporary basis, on daily wages or casually cannot be made permanent merely after length of time of service as that would defeat the scheme of public employment and encourage abuse of law.
- They cannot be simplicitor absorbed in the posts in which they were temporarily or irregularly appointed.
- If there is no sanctioned post, if the employee has no requisite qualification and if he is not appointed in terms of the procedure prescribed for appointment, he cannot be continued or absorbed in service.
- The service of the Public Service Commissions for the Union as well as the States contemplated under Article 315 of the constitution must be resorted to for public employment to ensure fairness in selection.
- Orders cannot be passed under Articles 226 or 32 of the Constitution to direct absorption in permanent employment of those who have been engaged without following due process of selection under the constitutional scheme.
- Orders in “Equity” outside constitutional scheme perpetuate illegalities and jettison the scheme of

public employment.

- The High Courts should be precluded from passing even interim orders or directions bypassing the constitutional scheme.
- There should be certainty in the matters of public employment.
- There is a distinction between regularisation of an irregular service and confirmity or permanance. Illegality cannot be regularised. Regularisation is not a mode of recruitment. That would introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules. There can be no regularisation if the initial appointment is in contravention of the rules.
- Irregularity, implies only want of compliance and want of elements which do not go to the root of the process. That alone can be regularised. Granting permanency is a totally different concept and cannot be equated with regularisation.
- Hence only appointments made after following due procedure can be regularised; not an appointment made without following the rules.
- Daily rated workers must be paid equal wages as the permanent workers, doing identical work. But, that does not give permanency to them.

- Economic considerations and financial implications of any public employment upon the State must be considered. An additional financial burden cannot be imposed upon the State for employees temporarily employed and not permanently and regularly employed.
- The High Court cannot transgress the limits on the basis of the whims or subjective sense of justice varying from judge to judge.
- The Court must decide question of law for the country and not individual cases without reference to the principles of law. That would "send out confusing signals and usher in judicial chaos."
- The Court cannot individualise justice. When ad-hoc or temporary appointments are made due to an exigency it should be replaced by a regularly selected employee as early as possible. The temporary employee may also compete along with others for the regular/permanent appointment.
- Even such temporary employee should be drawn from Employment Exchange or by an appropriate method consistent with the requirements of Article 16 of the constitution; e.g., by notice calling for applications.
- A temporary employee continued in service for long

term can be regularised only provided he is qualified as per the rules, has a satisfactory service record and the appointment is in consonance with the reservation policy of the State.

(Consequently the decision in the case of Dharwad District PWD Literate Daily Wage Employees Assn. Vs. State of Karnataka , 1990 2SCC, 396 and State of Haryana Vs. Piara Singh, 1002, 4SCC 118 came to be overruled.)

- When an appointment is contractual, ad-hoc, for a fixed period or terminable without notice, it comes to an end by afflux of time. Such appointee has no right to continue in the post or claim regularisation after the period of service in the absence of any rule providing for such regularisation.
- Ad-hoc employees or piece-rated employees are not entitled to reinstatement or regularisation when their employment is discontinued on completion of the task.
- A daily wage earner cannot be re-engaged against existent vacancy. **"**the judicial process would become another mode of recruitment dehors the rules**"** if that were allowed.
- If the initial entry is unauthorised and not against

a sanctioned vacancy it can never be regularised.

- Regularisation is allowed in 2 situations :

  (i) If an initial appointment is made against the sanctioned vacancy by following rules and regulations, even if it is on adhoc basis it can be regularised after a long period of time with or without artificial breaks if the services are otherwise required by the institution.

  (ii) If an initial appointment against any available vacancy is flawed in some procedural exercise, though due procedure for recruitment is otherwise followed, the irregularity may be waived and the employment regularised.

- If the recruitment procedure is bypassed, Articles 14 and 16(1) of the Constitution are violated. Such employment cannot be regularised.
- Employment made in contravention of mandatory provisions of the Act or statutory rules or by ignoring essential qualifications, is illegal and cannot be regularised.
- Regularisation on the ground of length of tenure alone would be misplaced sympathy.
- Ad hoc employment cannot be regularised or made

permanent.

- Even past incorrect regularisation or appointment cannot give an entitlement to further regularisation or appointment.

13. Consequently the following decisions came to be considered and were upheld:

- *R.N.Nanjundappa Vs. T. Thimmiah (1972)1SCC409*

- *State of Punjab Vs. Surinder Kumar (1992) 1 SCC 489*
- *Director, Institute of Management Development, U.P. Vs. Pushpa Srivastava (1992) 4 SCC 33.*
- *Madhyamik Shiksha Parishad, U.P. Vs. Anil Kumar Mishra (2005) 5 SCC 122.*
- *State of H.P. Vs. Suresh Kumar Verma (1996) 7 SCC 562*
- *Ashwani Kumar Vs. State of Bihar (1997) 2 SCC 1*
- *A. Umarani Vs. Registrar , Coop. Societies (2004) 7 SCC 112*
- *Latham Vs. Richard Johnson & Nephew Ltd.:(All ER p.123E) (1913) 1 KB 398 : (1911-13) All ER Rep.117 : 108 LT 4 (CA)*
- *Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh: (SCC p.144,para 36), (2004) 2 SCC 130*
- *State of U.P. Vs. Neeraj Awasthi (2006) 1 SCC 667*
- *State of Karnataka Vs. KGSD Canteen Employees' Welfare Assn. (2006) 1 SCC 567*

- *Union Public Service Commission Vs. Girish Jayanti Lal Vaghela (2006) 2 SCC 482.*

- *B.S.Minhas Vs. Indian Statistical Institute (1983)4 SCC 582: 1984 SCC (L&S) 26: AIR 1984 SC 363.*

- The Principle of equality enshrined in Article 14 and Article 16(1) of the Constitution, described as a facet of Article 14, is part of the basic structure of the Constitution. Therefore, adherence to these articles is a must for the purpose of public employment. *(Consequently the decision in the case of Kesavananda Bharati Vs. State of Kerala, (1973) 4 SCC 225, Indra Sawhney Vs. Union of India (2000) 1 SCC 168 came to be applied).*

- Rule of law is the core of our Constitution. Hence, a Court would be disabled from passing an order upholding violation of Article 14 r.w. Aticle 16 of the Constitution consistent with the scheme of public employment. Consequently the Constitutional mandate upon the High Courts is to necessarily hold that unless appointment is in terms of the rules amongst qualified persons there would be no right conferred upon the appointee. High Courts cannot prevent regular recruitment. High Courts also cannot ordinarily issue directions or interim directions for absorption, regularisation or permanent continuance of an employee

unless the recruitment was made regularly and in terms of the constitutional scheme. Passing such orders would hold up the regular recruitment procedure and impose an additional burden upon the State. High Courts cannot interfere in the economic arrangements of State or facilitate the bypassing of constitutional and statutory mandates or give a go by to the procedure established by law in public employment.

- Complete justice would be justice according to law. Though a Court can modify the relief it cannot grant relief which would perpetuate an illegality.

- The Court cannot be swayed by the fact that the concerned person worked for some time.

- The doctrine of legitimate expectation cannot be involved by an appointee who has been a temporary employee or a casual worker as he is aware of the nature of his employment and has accepted it with open eyes though he may not be in a position to bargain. Consequently no promise is held out by the Government that the temporary or casual worker could be made permanent after a passage of time.

- Temporary employees or casual workers or daily wage earner are a class by themselves. They cannot be compared with regularly employed candidates. They cannot be said to be holders of a post and cannot be equated with persons regularly employed. That would be treating unequals equally.

- There is no violation of Article 21 for making temporary employees permanent. It would really negate the rules under Article 21 of the Constitution if these were allowed to the vast majority of people waiting for an opportunity to compete for State employment.

- The right to be protected by Article 21 does not include the right to employment at present though it may in future be so included.

- The payment of daily wages does not amount to forced labour or breach of Article 23 of the Constitution as the employee accepts the employment on his own volition and with open eyes.

- The obligation on the State under Article 39(a) of the Constitution to ensure adequate means of livelihood to citizens would materialise if appointment to Government

service is made by way of proper selection in consonance with the constitution without individualising justice.

- The only exception in regularisation after a period of commuted work is for duly qualified persons in duly sanctioned vacant posts.

- The judgment in the case of Umadevi has been followed by the Apex Court in the case of *Surendra Prasad Tewari Vs. U.P. Rajya Krishi Utpadan Mandi Parishad & Ors. 2007(1) ALL MR 461* in which contractual, temporary employees appointed dehors the rules were held not entitled to regularisation in service even after 14 years and despite the interim order of the High Court.

13. In this case the petitioners have not been appointed for any sanctioned vacant post by the Government after following the rules of the Armed Forces otherwise applicable to the Central Government employees. The Petitioners, therefore, cannot be granted any relief.

14. The Petition is dismissed.

(SMT. ROSHAN DALVI, J.) **(SMT.RANJANA DESAI, J.)**